APPEAL NO. 93061

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On December 21 and 22, 1992, a contested case hearing (CCH) was held in (city) was, with (hearing officer) presiding as hearing officer. The issues acknowledged by the parties as correct were:

1 .Was the Claimant injured in the course and scope of employment;

2. If the injury is deemed to be in the course and scope of employment, it (sic) there a causal connection to all physical problems from which the Claimant is suffering and the accident of (date of injury);

3. Was the Claimant given a bona fide offer of employment;

4. Does the Claimant have disability related to the original accident of (date of injury); and,

5 .Was the Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) filed in a timely manner?

The hearing officer found that the respondent, claimant herein, was injured in the course and scope of employment, that there was a causal connection between the injury and claimant's physical problems, that there was no bona fide offer of employment to the claimant, that the claimant has disability related to the original accident and that claimant timely filed his TWCC-41.

Appellant, the (employer), a self-insured legal entity, self-insured herein, timely appealed and challenged the hearing officer's decision on all five issues, both as to a matter of law and the sufficiency of the evidence, asking the hearing officer's decision be reversed on all issues. Claimant timely filed a response brief rebutting the self-insured's allegations and requesting the hearing officer's decision be affirmed.

DECISION

Finding the evidence sufficient to support the determinations of the hearing officer, the decision is affirmed.

The evidence in this complex case is set out in some detail by the hearing officer in her statement of evidence and is adopted for purposes of this decision except as specifically noted to the contrary. Briefly, the claimant testified that he was a 25-year-old young man with a learning disability. During childhood, claimant developed an eye disease called keratoconus, which causes the cornea of one's eye to bulge. Depending on the circumstances and progression of the disease, this may require surgery called keratoplasty,

with one of several techniques available involving replacement of the cornea. The claimant testified that he had held some part-time jobs before going to work for the self-insured as a library aide in 1987. The claimant testified while so employed it was determined that he should have keratoplasty involving replacement of the cornea to his left eye. The surgery to the left eye was accomplished in January 1988 with the knowledge of claimant's supervisors in the library. The surgery restored much of claimant's vision in the left eye. Claimant further testified that he wanted full-time employment and that when a full-time position as a mail clerk became available in the self-insured's aviation department, he applied for and was accepted for the position. His new position was a mail clerk in a different department of the same self-insured. Claimant testified his first day on the job at the airport (the department where claimant was to work) was (date of injury), and that he spent the day completing forms and performing other administrative tasks. Claimant testified the first day he "actually worked" was June 4, 1991, when he was assigned to work in a warehouse packing foam (according to the description given by claimant being foam in the form of styrofoam kernels or pieces) into bags. Claimant testified that some time after lunch, perhaps around 3:00 p.m., as he was placing foam in a bag, a speck or particle of dust or debris flew in his left eye. Claimant states he immediately experienced pain and violently jerked his head back on reaction to the pain. Claimant testified that a coworker by the name of AP asked claimant "[a]re you all right?" Claimant said he immediately went to the restroom and flushed his eye out. Claimant continued to work and, on going home, told his parents about the incident. Claimant states he continued having pain in the left eye and it became more severe with sharp pain around 8:00 p.m. that evening. The next morning, claimant states he went to the aviation department and told his supervisor what happened and "signed a paper so he could go to the doctor." Claimant then went to see Dr. B, an ophthalmologist, who had been treating claimant for his eye condition. Other than finding claimant's eye was very light-sensitive, no other problems were noted. On June 6, 1991, claimant again went to Dr. B because of sharp pain in his eye. The doctor's progress notes indicate a diagnosis of "Keratitis OS" (inflammation of the cornea of the left eye).

As the hearing officer lists in the statement of evidence, and as is supported by the medical evidence, the vision in claimant's eye grew worse and he began to experience other physical problems including temporomandibular joints (TMJ). Claimant was referred to a number of specialists including Dr. T, another ophthalmologist who, by letter dated July 10, 1991, stated "I am unable to identify any ocular findings which would explain [claimant]'s symptoms of pain and discomfort in the left eye;" a psychiatrist who noted "no mental illness" on October 30, 1991; Dr. N, a neurologist who, by report dated October 11, 1991, noted "[t]he exact etiology of [claimant]'s head pain is not clear . . .;" and Dr. E, an orthodontist who, by letter dated July 22, 1992, states ". . . I feel that the temporomandibular joint dysfunction now present is the result of the injuries he received (in the on-the-job accident). TMJ dysfunction is almost always related to head and facial trauma." Claimant contends that he jerked his head backward in reaction to getting the foreign object in his eye, and this resulted in the head and facial trauma which has caused the TMJ. Claimant, at the time of

the CCH, testified that he continues to receive treatment for his various ailments; that the doctors have stated he is legally blind in his left eye; that he has severe headaches, pain in his left shoulder and neck; and that he is unable to drive a car or perform any but the simplest of activities. Claimant testified he has been unable to work since June 6, 1991 and that several of the doctors have imposed work restrictions.

Claimant concedes he received a letter regarding his return to his former job at the library and that the self-insured has telephoned on several occasions about potential positions. Apparently in response to the letter from self-insured, claimant went for a job interview but was not offered a job because of his medical condition. The letter with the so-called job offer was not offered into evidence by either party. None of the telephone calls about potential positions apparently were specific regarding duties, hours, salary, and location. Further, claimant testified that he was unable to work and that his doctors had told him he could not work, when self-insured representatives called about potential positions.

The thrust of self-insured's case at the CCH was that the injury, as described by claimant with the particle going into claimant's eye, never occurred; that claimant had a preexisting condition which simply got worse on its own, and that claimant had been offered his old library job. The hearing officer states in her discussion "[t]he [self-insured] called no witnesses who were present on the day that the claimant stated that the particles flew into his eye to testify that they did not observe the claimant behave in the manner in which he testified." That statement is technically correct; however, we note that self-insured offered into evidence a transcribed interview of Mr J, claimant's supervisor, who was identified by claimant as P.J., transcribed November 10, 1992, and a transcript of a recorded interview with AP, dated November 5, 1992. While claimant stated he was working with Mr. P in the warehouse, the transcribed interview does not focus on the warehouse incident of June 4, 1991 but rather asks if Mr. P knew the claimant, what a mail run consists of, and whether he was aware of any injury claimant sustained. Mr. P response was "[n]o, uh, uh, I don't see any reason why he would have gotten hurt. All we do is walk around and drive."

A.

COURSE AND SCOPE OF EMPLOYMENT

Self-insured attacks the hearing officer's determination that claimant's injury was incurred in the course and scope of employment on the grounds that (1) "claimant's original eye problem was an ordinary disease of life . . . [and] that aggravation, acceleration, or excitement of a nonoccupational disease does not constitute a compensable injury . . ." and (2) that statements "by coworkers and a supervisor" proved that claimant had not sustained an injury in the course and scope of his employment.

While it is undisputed that claimant had keratoconus and had a keratoplasty in 1988, the hearing officer incorrectly referred to this condition as "an ordinary disease of life" in her discussion, although she subsequently correctly refers to the condition as a "preexisting condition." The self-insured maintains that "even if claimant sustained an eye irritation due to windy conditions in the work environment, it would not constitute a compensable injury . . . as a matter of law," citing Bewley v. Texas Employers Ins. Ass'n, 568 S.W.2d 208 (Tex. Civ. App.-Waco 1978, writ ref'd n.r.e.). Ordinary disease of life is a term of art used in Article 8303-1.03(36) in excluding from occupational diseases those diseases to which the general public is exposed outside of the employment. In Bewley, *supra*, the employee's illness, including cold, sore throat and pneumonia resulting from exposure to water and inclement weather in the course of employment, was held an ordinary disease of life to which the general public was exposed, and thus was not compensable. Claimant in this case is not alleging that general exposure to dusty or windy conditions caused him to sustain an occupational disease. Rather, claimant is alleging a specific, discrete event traceable to a definite time, place and cause, being that shortly after lunch on June 4, 1991, while filling bags of foam, a foreign object, particle or dust flew into claimant's eye causing him to violently jerk his head backward in reaction to the pain in his eye. Olson v. Hartford Accident & Indemnity Co., 477 S.W.2d 859 (Tex. 1972) cited by claimant, held for there to be an accidental injury there must be an undesignated, untoward event traceable to a definite time, place and cause. It is claimant's contention in the instant case that the injury is not a situation involving an ordinary disease of life, or the natural flare-up of a preexisting condition, but rather the intrusion of a foreign object or particle traceable to a specific time, place and cause. The hearing officer found that on June 4, 1991, a particle of dust flew into the claimant's eye, causing him to jerk his head involuntarily backward in reaction to the dust. That was the claimant's testimony and was supported by his parents and a counselor for San Antonio Independent Living Services who spoke with the self-insured's management personnel in the week following the accident. There is sufficient evidence to support the hearing officer's finding on this point.

Regarding self-insured's contentions that coworkers' and supervisor's statements "proved" claimant had not sustained an injury, we note that the hearing officer is the sole judge of the weight and credibility to be given the evidence. *See* Article 8308-6.34(e). The hearing officer commented that the self-insured called no witnesses who were present on the day that claimant testified the particle flew into his eye. As previously noted, there is a slight inconsistency in what claimant stated AP says and the fact that Mr. P in his statement seems to be focusing on delivering mail. When presented with such conflicting evidence, the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGallaird v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986). The hearing officer evidently gave great credibility and weight to claimant's testimony in that he took the witness stand and endured several hours of direct and cross-examination. We find no error in the hearing officer's determination that a claimant sustained an injury in the course and scope of his employment on June 4, 1991

when a particle of dust flew into claimant's eye, causing him to involuntarily jerk his head backward.

B.

CAUSATION

The self-insured next contends that "in order to establish that a compensable injury caused other related injuries there must be testimony to establish within a reasonable probability that the related injuries are causally connected to the compensable injury," citing Hernandez v. Texas Employers Ins. Ass'n, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ). We note that roughly 59 pages of medical reports and records were put into evidence by claimant and 20 pages of medical records and reports plus nine pages of analytic case summary were put into evidence by the self-insured. Consequently, there was no dearth of medical evidence. It is also evident from the hearing officer's analysis and detailed endnotes that she carefully reviewed and considered the evidence presented. We do not disagree with the proposition advanced in Hernandez, *supra*, that "[g]enerally, lay witness testimony is sufficient to establish a causal connection where, based upon common knowledge, that fact finder could understand a causal connection between the employment and the injury. (citations omitted) . . . However, expert testimony may be required where . . . the fact finder lacks ability, from common knowledge, to find a causal connection." We would parenthetically note that in complex medical cases of causation, such as this case, it is rare that there is a unanimity of opinion among the medical experts. In this case, Dr. B noted an inflammation of the left eye on June 6th, two days after claimant testified the particle flew in his eye. The next entry in Dr. B records is June 17th, "[f]ol-up Keratitis" (inflammation) and "[h]as a generalized punctate stain left lower graft." On June 25th "[f]ollow up Keratitis O.S. Pt says eye problem has just gotten worse." On June 25th, at claimant's request, Dr. B spoke with claimant's supervisor to allow claimant to "stay off [work] until cleared by me to return to work." In a July 8th entry Dr. B refers claimant to Dr. Terry. Claimant then is referred to a series of doctors, none of which appears to have a definitive opinion on causation regarding claimant's eye problem. Dr. N, the neurologist, reports by letter dated February 4, 1992, "I still feel he had cervical nerve root irritation, which may have been from hyperextension of the neck associated with his eye injury." That comment is restated in Dr. N March 3, 1992 letter where he states "I still feel he has vascular headaches related to a cervical hyperextension, which occurred with (sic) the foreign object entered his eye." Both claimant and self-insured refer to Dr. E (the orthodontist) entry of July 22, 1992 which notes the complexity of claimant's problems and states ". . . I feel that the temporomandibular joint dysfunction now present is the result of the injuries he received at that time. TMJ dysfunction is almost always related to head and facial trauma." Claimant points to this as showing trauma was incurred when claimant jerked his head backwards in response to getting something in his eye. Self-insured points to the same quote saying it ". . . obviously indicates that Dr. E (sic) was under the mistaken belief that the claimant received several injuries related to serious head and facial trauma." In Colonial Penn

Franklin Insurance Company v. Mayfield, 508 S.W.2d 449 (Tex. App.-Amarillo 1974, writ ref'd n.r.e.) cited by self-insured, the court held that there were three methods of establishing causal relationship between injury and "incapacity" which were summarized as "(1) general experience or common sense; (2) sequence of events plus scientific generalizations testified to by a medical expert; and (3) testimony of probable causation articulated by a medical expert."

We note, as does the hearing officer, that the self-insured did not have the claimant examined by an independent medical expert, or other doctor of its own choosing, concerning the symptoms from which the claimant is complaining. Self-insured's effort, in this respect, was the nine page (actually five pages of case discussion) case summary by "The Analytical Group." Here, one or more doctors of unknown specialties presumably reviewed the medical records, reports and documents available, without examining the patient, extracted isolated comments by claimant's doctors, and concluded "I find it exceedingly difficult to accept the claim that the myriad of symptoms complained of by this patient are due to a speck of dust in the eye and a reflex movement of his head." We have held that any conflicts or inconsistencies in the medical evidence are matters to be resolved by the trier of fact. Highlands Underwriters Insurance Co. v. Carabajak, 503 S.W.2d 336, 339 (Tex. Civ. App.-Corpus Christi 1973, no writ). The hearing officer also judges the weight to be given expert medical testimony and resolves conflicts and inconsistencies in the testimony of expert medical witnesses. *See* Texas Workers' Compensation Commission Appeal No. 92056, decided April 3, 1992, citing Texas Employers' Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer, in determining an injury occurred, reviewed the medical evidence and determined there was a chain of events related back to the original injury where the particle caused claimant's eye to become infected, his vision to deteriorate and the backward jerk reaction causing damage to claimant's face and jaw, causing development of TMJ in his jaw which restricts claimant's ability to eat and speak. Based on our review of the evidence, we cannot say that the determinations of the hearing officer on this point were so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, warranting setting aside the hearing officer's decision. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

C.

OFFER OF EMPLOYMENT

Self-insured argues that there was sufficient evidence to support a finding that there was a bona fide offer of employment. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5), which implements Article 8308-4.23(f), provides:

Rule 129.5: Bona Fide Offers of Employment

(a)In determining whether an offer of employment is bona fide, the commission shall consider the following:

(1)the expected duration of the offered position;

(2)the length of time the offer was kept open;

(3)the manner in which the offer was communication to the employee;

(4)the physical requirements and accommodations of the position compared to the employee's physical capabilities; and

(5)the distance of the position from the employee's residence.

(b)A written offer of employment which was delivered to the employee during the period for which benefits are payable shall be presumed to be a bona fide offer, if the offer clearly states the position offered, the duties of the position, that the employer is aware of and will abide by the physical limitations under which the employee or his treating physician have authorized the employee to return to work, the maximum physical requirements of the job, the wage, and the location of employment. If the offer of employment was not made in writing, the insurance carrier shall be required to provide clear and convincing evidence that a bona fide offer was made.

We have held in Texas Workers' Compensation Commission Appeal No. 92235, decided July 20, 1992, "[t]he burden was on appellant [self-insured in this case] to prove that a bona fide offer of employment was made." In this case it is undisputed that self-insured sent claimant some kind of letter regarding employment. The contents of the letter are unknown as the letter was never offered into evidence by either of the parties. It apparently would not have met the requirements of a bona fide offer in that claimant testified, uncontradicted, that in response to that letter he went to an interview but was not selected for the position. An offer, or invitation, to interview for a position does not constitute a bona fide offer of employment under the 1989 Act. Further, it is undisputed that several attempts were made to contact the claimant to discuss offers of employment. Attempting to contact an employee verbally for purposes of offering employment also does not constitute a bona fide offer of employment under the 1989 Act. If the offer is not in writing, then the self-insured must provide clear and convincing evidence that a bona fide offer was made. *See* Rule 129.5(b).

Accepting everything self-insured argues in its appeal, on this point, as true, self-

insured fails to establish by clear and convincing evidence that any kind of position was ever offered, and if there was an offer of employment what the physical requirements of the job, the wage, or the location of the employment might be. Self-insured's contention the hearing officer erred is without merit.

D.

DISABILITY

In this regard self-insured "adopts its arguments as previously stated that claimant did not sustain an injury in the course and scope of his employment and that there was no causal connection to the claimant's physical problems and the alleged accident of (date of injury)." Self-insured cited Employer's Casualty Co. v. Bratcher, 823 S.W.2d 719 (Tex. App.-El Paso 1992, no writ), a case where a preexisting condition flares up while at work. We understand that it is self-insured's position that claimant had a preexisting condition which "flared up" or got worse while claimant was employed by the self-insured. However, the hearing officer found a specific, discrete injury (as opposed to a flare-up of a preexisting condition) when the foreign particle entered claimant's left eye, traceable to a definite time, place and cause. The issue now is whether claimant has suffered a disability, as defined by the 1989 Act, because of that injury. Article 8308-1.03(16) says disability "means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Although initially Dr. B released claimant to return to work, subsequently by telephone contact, recorded in his medical records, Dr. B on June 25, 1991 told claimant's supervisor that claimant was not to work "until cleared by me to return to work." There is extensive uncontradicted testimony by the claimant of his inability to work and equally extensive medical documentation of claimant's inability to perform any but the simplest tasks. We have held in Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992, that the claimant's testimony alone may establish disability, even if contradicted by medical evidence, which was not the case here. The hearing officer had sufficient evidence to justify a determination of disability, commencing June 6, 1992 and continuing to the date of the CCH.

E.

NOTICE OF INJURY AND CLAIM

Self-insured contends the date of injury to be (date of injury) as reported on the Employee's Notice of Injury and Claim for Compensation (TWCC-41) and acknowledged by the parties at the CCH in the statement of issues. Self-insured then contends that claimant has failed to timely file his Notice of Claim as required by Article 8308-5.01 due to the following sequence:

(1)Claimant's date of injury is (date of injury);

(2)Claimant filed his Notice of Claim June 3, 1992;

(3)1992 was a leap year with February 1992 having one extra day;

(4)Claimant filed his Notice of Claim 366 days or 1 year and a day after the date of injury.

First, we have held that the date alleged on the TWCC-41 does not have to be the date found by the hearing officer as the date of injury. The hearing officer is charged with considering all the evidence to determine when the injury occurs. *See* Texas Workers' Compensation Commission Appeal No. 91097, decided January 16, 1992, and Texas Workers' Compensation Commission Appeal No. 92022, decided March 11, 1992. The overwhelming weight of the evidence was that claimant was hired June 3rd, completed paperwork and was injured June 4th, the first day in the warehouse. Further, Article 8308-5.01(b) states: ". . . the claim must be filed not later than one year after the date of the occurrence of the injury." We note the statute states "one year," not 365 days, nor does it make exceptions for leap years. The hearing officer found claimant's injury to have occurred on June 4, 1991 and the claim was filed June 3, 1992, which was within one year after the date of the occurrence of the injury. Self-insured's contention on this point is totally without merit.

The decision of the hearing officer is not so against the great weight and preponderance of the evidence as to be manifestly unjust or wrong, International Ins. Co. v. Torres, 576 S.W.2d 862 (Tex. App.-Amarillo 1978, writ ref'd n.r.e.) and is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge